

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1982

Cir. Ct. No. 2011CV6947

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN EX REL. JERRY WILLIAMS,

PETITIONER-APPELLANT,

V.

WAYNE WIEDENHOEFT, DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
KEVIN E. MARTENS, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Jerry Williams appeals the circuit court order denying his petition for writ of certiorari following his probation revocation. We affirm.¹

BACKGROUND

¶2 In 1998, Williams was convicted of two counts of armed robbery. He was sentenced to ten years in prison on each count, with the sentences to run consecutively. The sentence on the second count of armed robbery was stayed and Williams was placed on probation for a ten-year period consecutive to his sentence on the first count. Williams started his probation term in December of 2009.

¶3 In September of 2010, after testing positive for illicit drugs, Williams absconded and his whereabouts were unknown for three months. When police found Williams, he provided false information as to his identity. After Williams was placed in custody, his supervising agent recommended revocation based upon ten alleged violations of the conditions of his supervision. Three of the ten alleged violations also breached an earlier Alternative to Revocation Agreement Williams had signed.

¶4 In a signed written statement, Williams admitted to various violations. Additionally, at the revocation hearing, Williams, through his attorney,

¹ David H. Schwarz was the administrator of the Division of Hearings and Appeals at the time this action was filed. Counsel for Schwarz subsequently notified this court that Schwarz retired and advised that Wayne Wiedenhoft is now the acting administrator. The caption of this case has been amended to reflect the change. *See* WIS. STAT. § 803.10(4)(a) (“When a public officer ... is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, ... the successor is automatically substituted as a party.”).

stipulated that he had violated the terms of his supervision as alleged.² Based on Williams's admissions, the testimony of his supervising agent, and other evidence that was submitted, the Administrative Law Judge (ALJ) issued a decision finding that Williams had committed the violations.

¶5 The decision went on to explain:

The issue at this hearing was the appropriateness of treatment as an alternative to revocation. Mr. Williams testified that he has been released to parole supervision on three prior occasions; each of those terms of supervision was revoked for the use of illicit drugs. [Williams] signed a formal alternative to revocation agreement placing him in treatment at the Day Reporting Center in response to earlier violations occurring between August 18 and 23, 2010. Mr. Williams submitted a urine specimen that tested positive for illicit drug use and stopped reporting for treatment. He absconded from supervision. When police questioned him, he provided a false name to officers.

Mr. Williams contends he is in need of mental health treatment. He acknowledges that his prior agent referred him to the Milwaukee County Mental Health Complex but he did not follow up on that recommendation. The record suggests Mr. Williams's mental health issues go back to the death of his mother in his presence. Mr. Williams has been in prison and on supervision several times since then. Mr. Williams has not addressed his mental health issues during that time. He ignored recommendations by his prior agent.... In addition, Mr. Williams's decision to abscond from supervision made him unavailable to the department and to the resources the department could offer. These violations

² When he testified, Williams confirmed the stipulation during the following exchange with his attorney:

[Attorney] Now obviously you are aware that we have stipulated to the allegations so you're admitting that you did not do everything you should have been doing on supervision correct?

[Williams] Yes.

occurred after the department had implemented a formal [A]lternative to [R]evocation [A]greement with Mr. Williams placing him in treatment.

The ALJ concluded that revocation was “warranted and necessary to impress upon Mr. Williams the seriousness of his conduct.” In addition, the ALJ found that there were no appropriate alternatives to revocation.

¶6 On review, the Division of Hearings and Appeals (the division) affirmed, upholding the ALJ’s decision in its entirety. The division explained:

Jerry Williams requests mental health and substance abuse treatment as an alternative to revocation. However, he was previously referred for treatment as an alternative to revocation in response to prior violations. He nevertheless continued to use illegal drugs, failed to attend his treatment and absconded from supervision altogether. When he was finally arrested he gave police a false name, thereby indicating his intent to evade supervision indefinitely. Under these circumstances it is clear that Williams is not willing to comply with treatment or with supervision in any meaningful way. Consequently, he is a poor candidate for yet another treatment alternative to revocation.

(Parenthetical omitted.)

¶7 The circuit court agreed with the division and denied Williams’s petition for writ of certiorari.

¶8 On appeal, Williams claims the division failed to consider alternatives to revocation and that its actions were arbitrary, oppressive, and unreasonable, representing its will and not its judgment. In addition, Williams argues that he was denied due process when he was revoked based on what he contends was inadequate information. Williams further submits that the circuit court failed to take these issues into account when it denied his petition.

DISCUSSION

¶9 Our review is of the division’s decision, not that of the circuit court. *See State ex rel. Warren v. Schwarz*, 211 Wis. 2d 710, 717, 566 N.W.2d 173, 176 (Ct. App. 1997), *aff’d*, 219 Wis. 2d 615, 579 N.W.2d 698 (1998). And, on certiorari, our review is limited to: “(1) whether the tribunal stayed within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will, not its judgment; and (4) whether the evidence was such that it might reasonably make the decision that it did.” *Ibid.*

¶10 Here, Williams’s claim that the division failed to establish that there was no reasonable alternative to revocation involves the third inquiry. We review this prong on an erroneous exercise of discretion standard. *See Van Ermen v. Dep’t of Health & Soc. Servs*, 84 Wis. 2d 57, 65, 267 N.W.2d 17, 20–21 (1978). The duty of the division in exercising this discretion is set forth in the American Bar Association’s guidelines adopted in *Plotkin v. Dep’t of Health & Soc. Servs*, 63 Wis. 2d 535, 544–545, 217 N.W.2d 641, 645–646 (1974). *See Warren*, 211 Wis. 2d at 724–725, 566 N.W.2d at 178–179. Among other things, the *Plotkin* standards require the division to consider alternatives to revocation. Because the division’s decision is discretionary, however, we need only satisfy ourselves that the decision was made based on “‘facts that are of record or that are reasonably derived by inference from the record’” and that the conclusion is “‘based on a logical rationale founded upon proper legal standards.’” *Van Ermen*, 84 Wis. 2d at 65, 267 N.W.2d at 21 (citation omitted).

¶11 We, like the circuit court, conclude that there is no support for Williams’s contentions that the division failed to consider available alternatives to

revocation. It is clear in each of the decisions that were issued in this matter (the ALJ's, the division's, and the circuit court's) that alternatives were considered but were deemed inappropriate based on Williams's past conduct. The circuit court "agree[d] with the ALJ[,] that given the nature of his underlying conviction, Williams'[s] ongoing use of illicit drugs coupled with his decision to abscond from supervision, creates a serious risk that he will engage in future crime if he remains in the community." The circuit added: "Furthermore, as the [d]ivision points out, Williams'[s] past conduct makes it ... clear that he is unwilling to comply with treatment or with supervision in a meaningful way." This court is at a loss as to what more it can add to the cogent analyses already provided to Williams on this issue.

¶12 Also related to the third inquiry—whether the department's action was arbitrary, oppressive or unreasonable and represented its will, not its judgment—is Williams's argument that the statement he signed admitting to various violations of the terms of his release was written by his agent *after* he signed it. Williams submits that when he was asked to sign the statement form, he thought he was doing so to acknowledge that the preprinted disclaimer language found at the top of the form had been read to him. He claims "[h]is signing the paper was not for a statement the agent was later going to write on it falsely claiming that appellant ... confessed to using drugs."

¶13 The agent testified about the statement during the hearing, explaining:

I wrote [the statement] out after I read him the disclaimer at the top. I wrote out the statement based on his answers to my questions. I went over the statement at least once[,] probably more than once[,] with Mr. Williams prior to him signing it to make sure he understood

everything that was in it and agreed that that was his account.

Williams never raised any issues related to the taking of that statement during the hearing. Instead, it appears he raised this issue for the first time in his brief in support of writ of certiorari filed with the circuit court. “A reviewing court on certiorari may not[, however,] consider matters outside the record on return to the writ. Allegations in the petition cannot add facts which are not in the record.” *See State ex rel. Irby v. Israel*, 95 Wis. 2d 697, 703, 291 N.W.2d 643, 646 (Ct. App. 1980).

¶14 Moreover, as noted above, during his testimony, Williams acknowledged having stipulated to the alleged violations, which included drug use in violation of the terms of his supervision.³ As the State points out, Williams is not challenging or seeking relief from the stipulation; “he instead seeks to litigate factual issues on appeal that were completely resolved through that stipulation he entered into, while represented by counsel, over two years ago.” This court cannot

³ We note that even on appeal Williams concedes he violated one of the conditions of his supervision. He submits:

It was only after [his new supervising agent] made it clear that he was gunning for Williams, and then [the agent] alleging that [Williams] had a positive U.A. [i.e., urinalysis] for opiates and cocaine, that Williams panicked and fled, which he concedes that he absconded, his one and only rule violation.

In doing so, Williams seemingly overlooks that this “one and only” conceded rule violation is a sufficient ground for the revocation of his probation. *See State ex rel. Cutler v. Schmidt*, 73 Wis. 2d 620, 622, 244 N.W.2d 230, 231 (1976) (Violating one condition of parole is a sufficient basis for revocation.); *State ex rel. Warren v. Schwarz*, 211 Wis. 2d 710, 724, 566 N.W.2d 173, 179 (Ct. App. 1997) (“Violation of a condition is both a necessary and a sufficient ground for the revocation of probation.”) (emphasis added), *aff’d*, 219 Wis. 2d 615, 579 N.W.2d 698 (1998); *see generally Snajder v. State*, 74 Wis. 2d 303, 315, 246 N.W.2d 665, 671 (1976) (“absconding from probation” is “a very serious violation”).

make factual findings on certiorari review and certainly cannot resolve a factual dispute that was never even presented to the Department of Corrections or the division. *See Wurtz v. Fleischman*, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155, 159 n.3 (1980) (court of appeals may not find facts).

¶15 Williams also submits that due process violations occurred in the underlying revocation proceedings. Again, Williams’s due process complaints appear to have been raised for the first time before the circuit court when he argued in the brief supporting his petition that he wanted the circuit court to review “the illegal revocation proceedings the agent was forcing him into. He made the demand because he had not given any signed confessions to using illegal drugs as stated by the agent.” There are no facts of record concerning these claims (only Williams’s conclusory assertions), and our review is limited to the facts of record. *See State ex rel. Irby*, 95 Wis. 2d at 703, 291 N.W.2d at 646.⁴

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

⁴ In his reply, for the first time, Williams asserts “that he was only guilty of absco[]nding ... in category I, and that he should have only been revoked for 15% ... of the ten[-]year stayed sentence, or 18 months.” To the extent this is an argument that the ALJ exceeded the Department of Corrections’ operations manual when it ordered him to be reconfined for ten years, it is undeveloped. *See League of Women Voters v. Madison Cmty. Found.*, 2005 WI App 239, ¶19, 288 Wis. 2d 128, 140, 707 N.W.2d 285, 291. We need not address arguments made for the first time in a reply brief. *Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502, 508 n.11 (Ct. App. 1995) (it is a well-established rule of appellate practice that the court will not consider arguments raised for the first time in a reply brief). We note in passing, however, that the ALJ is not bound by the department’s operations manual. *See George v. Schwarz*, 2001 WI App 72, ¶1, 242 Wis. 2d 450, 454, 626 N.W.2d 57, 60.

